No. 86-1990

Supreme Court, U.S.
FILED
JUL 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WEST 14TH STREET COMMERCIAL CORP.,
WEST 14TH STREET GARAGE CORP., and
WEST 14TH STREET LAUNDRY CORP.,

Petitioners,

vs.

5 WEST 14TH OWNERS CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

I. Should this Court grant a writ of certiorari to review the decision of the Court of Appeals when the petition fails to identify any legal issue worthy of the certiorari jurisdiction of this Court but merely seeks a third review of the factual issues in controversy?

II. Should this Court grant a writ of certiorari to review the decision of the Court of Appeals, which stated that a lease can be but one form of a contract, merely because a federal statute used the terms "contracts" and "leases" in different sections addressing unrelated situations?

III. Should this Court grant a writ of certiorari to review the decision of the Court of Appeals which did not find a conflict between state and federal law when no such conflict exists and Congress reconciled the different subject matters by express statutory provision?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding in the court whose judgment is sought to be reviewed are set forth in the caption of the case in this Court.

Respondent 5 West 14th Owners Corp. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

The respondent, 5 West 14th Owners Corp., respectfully requests that this Court deny the petition for the issuance of a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit in this case reported at 815 F.2d 188.

STATUTORY PROVISIONS INVOLVED

Those statutory provisions involved which are not part of the appendix to the petition are, *infra*.

COUNTER STATEMENT OF THE CASE

In 1982 Parker 14th Associates (the "developer") decided to sell its apartment building located at 5-19 West 14th Street, New York, New York. (A 3a)* Rather than offer its building in the open market, the developer created the respondent cooperative corporation to be its own controlled purchaser of this property (A 28a) and caused the respondent to enter into a contract of sale of said property. (JA 508-529)** In order to provide the respondent with the funds which the developer wished to receive from the sale of the building, the developer prepared and filed an Offering Plan under New York State law to permit it to sell the respondent's stock to the public. (JA 85-128) The developer provided in the Offering Plan that it had the right to direct the respondent to amend any and all portions of the respondent's Offering Plan in any way it wished, including the right to abandon the Offering Plan in its entirety prior to it being declared effective. (JA 93,127) The developer also created the petitioners for the purpose of securing to itself certain contracts with the respondent which would permit it to retain, for up to forty years, the income from three revenue generating assets it was to sell to the respondent: the laundry room, the parking garage and the four commercial stores located in the building. (A 280, 3a-6a; JA 117-123) Thereafter, and on September 6, 1984, the developer sold the apartment building to the respondent and caused the respondent to execute the three self dealing contracts with the developer's affiliates, the petitioners herein. (JA 250, 255-317)

The respondent, once free of the developer's dominion and control, held a shareholder's meeting on June 12, 1985 at which time more than 80% of the eligible shareholders voted to terminate the developer's three self dealing contracts pursuant to

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* Citations in the form "A ____" refer to the pages in the Appendix to the Petition.

** Citations in the form "JA ____" refer to pages in the Joint Appendix in the Court of Appeals.

15 U.S.C. Section 3607 and respondent so notified the petitioners. (JA 333-344) This litigation ensued.

Petitioners brought suit in the United States District Court for the Southern District of New York, *inter alia*, for a declaratory judgment that respondent had no right to terminate their leases. (JA 4-9) On motion for summary judgment, the District Court granted petitioners such relief, finding that the right to terminate these agreements pursuant to 15 U.S.C. Section 3607 was not available to the respondent because the developer had undertaken what was found to be "arms length negotiations" with certain pre-conversion occupying tenants. (A 26a-42a)

On appeal, the United States Court of Appeals for the Second Circuit rejected the reasoning of the District Court and held that the "negotiations" between the developer and the pre-conversion occupying tenants were not relevant to the applicability of 15 U.S.C. Section 3607. (A 23a-25a) Further, the Court of Appeals found that the three agreements were contracts susceptible to the applicability of the federal statute, as they were executed after October 8, 1980, were for more than three years, were entered into between the developer's affiliates and the respondent while there was special developer control over the respondent, and, as to the garage and laundry facilities, but not as to the commercial stores, that they provided for the operation, maintenance or mangement of property serving the respondent's shareholders. The Court of Appeals held that the laundry and garage leases were terminable but that the master lease for the commercial stores was not. (A 15a-23a)

REASONS WHY PETITION SHOULD BE DENIED

I. The Petition Presents No Proper Issues For Review By Writ Of Certiorari

The decision of the Court of Appeals does not conflict in any way with the prior decisions of this Court. In addition, the Court of Appeals decision does not conflict with any decision of any other Circuit Court of Appeals nor does it conflict with the decision of any State Court of last resort. To the contrary, it appears that the decision of the Court of Appeals is being followed without reservation in the other cases identified in the petition pending in the United States District Court for the Southern District of New York. Moreover, the decision of the Court of Appeals does not depart from the accepted and usual course of judicial proceedings nor has it decided such an important question of federal law as to call for the exercise of this Court's power of supervision. The Court of Appeals' decision does not raise an important question of federal law which has not been, but should be, settled by this Court, and, the Court of Appeals made no error, respecting the issues raised in the petition, which would result in a contrary determination by this Court if said petition were granted.

The petition suggests that the decision of the Court of Appeals is riding the crest of a tidal wave of litigation which has descended upon the District and State Courts. The petition further suggests that this case involves issues potentially present in thousands of existing and future cooperative and condominium projects throughout the country. The truth is to the contrary. The petition identifies a mere dozen cases which have been brought since 1980 involving 15 U.S.C. Section 3607. All twelve cases identified in the petition are presently pending in the County, City and State of New York, and the developer herein, or its other corporate entities, is the real party-in-interest in three of them.[1] All of the federal cases identified in the petition, save one in

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[1] See *305 East 24th Owners Corp. et al. v. Parman Co., et al.*, No. 85 Civil 3788 (S.D.N.Y. filed May 20, 1985); *520 East 72nd Commercial Corp., et al., v. 520 East 72nd Owners Corp.*, No. 86-7581 (S.D.N.Y. filed October 3, 1986) and this lawsuit.

which the developer herein is the real party-in-interest, were filed only *after* the District Court held the federal statute to be inapplicable: the institution of these subsequent lawsuits was merely a response to the faulty reasoning of the District Court herein which was corrected by the Court of Appeals. Obviously one state court case, and one partially reversed federal court case, do not constitute a tidal wave of litigation.

Moreover, while the Condominium and Cooperative Abuse Relief Act of 1980 is the subject of litigation in these twelve New York conversion projects, of which the developer herein is involved in three, the Attorney General of the State of New York has reported that 3,036 residential cooperative and condominium conversion Offering Plans were accepted for filing during the period 1981-1986. (See, *New York State Department of Law, Public Information Office, Real Estate Financing Bureau Statisticians Annual Reports*) Thus, the issues which the petitioners claim are potentially present in every conversion project have actually resulted in litigation in less than four tenths of one percent of such projects in New York State in this six year period. Even in the one county in New York State which has produced all of the litigation identified in the petition, the aforementioned Reports of the New York State Attorney General reveal that 1,322 Offering Plans for residential cooperative and condominium conversions in New York County were accepted for filing during this period, 1981-1986, and therefore the pending lawsuits represent less than one percent thereof. Obviously, neither a tidal wave of litigation nor a significant industry impact has resulted from the subject statute as suggested in the petition. The petitioners' wish for self importance does not exist in reality.

The legal issues resolved by the Court of Appeals did not involve esoteric questions of national housing policy or intricate questions of statutory construction. The Court of Appeals applied basic principles of law: that a lease is but one form of a contract, and that a statute is applicable when the requisite facts exist to justify its application. These legal principles are too well established to be worthy of this Court's review and inevitable reaffirmation.

While styled as a case of first impression arising under the Condominium and Cooperative Abuse Relief Act of 1980, the Questions Presented by the petitioners are based solely upon the particular facts existing in this case which were created by the singular conduct of the developer herein. The Questions Presented reflect a misunderstanding of the remedial nature of the subject federal statute. The petitioners focus their attention on the developer's purported "negotiations" with certain pre-conversion tenants as though the right to terminate the subject contracts is granted to said pre-conversion tenants. It is not. Section 3607 grants said right only to the respondent cooperative corporation and its future shareholders.[2] The petitioners also focus their attention on the economic aspects of the "negotiations" as though 15 U.S.C. Section 3607 permits termination only when the transaction is found to be unconscionable. It does not. Section 3607 grants the respondent the statutory right to terminate, without regard to the economic fairness of the transaction, when the respondent was unable to decide for itself whether and with whom to enter into the contracts.

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[2] The absence in Section 3607 of any recognition of even the existence of pre-conversion occupying tenants confirms the lack of relevancy of their negotiations to the applicability of said statutory section. While petitioners' Statement Of The Case highlights the purported negotiations between the developer and certain of the pre-conversion tenants, so as to create an appearance of a binding contract, the right of a cooperative corporation to terminate self dealt contracts is expressly made non-waivable in 15 U.S.C. Section 3614 which states: "Any condition, stipulation, or provision binding any person to waive compliance with any provisions of this chapter shall be void."

II. This Court Should Not Exercise Its Certiorari Jurisdiction to Consider Whether a Lease Is But One Form Of a Contract

The petitioners rest their first Question Presented upon the contention that 15 U.S.C. Section 3607, which expressly permits the termination of contracts, "should not be interpreted to apply to leases at all" and that "Section 3607 does not apply to leases". (Petition, pp. 9 and 11)

The Court of Appeals properly rejected this contention and held that a lease is but one form of a contract, and, as in this case, may contain convenants that require the lessee to perform certain contractual services for the landlord. (A 18a-19a) The petitioners, however, resubmit to this Court their specious argument that because Section 3608 affects "unconscionable leases", then the scope of "self dealing contracts" identified in Section 3607 must be restricted so as to exclude all contracts which the developer drafted in the form of a lease. To accept this contention is to exalt form over substance which the Court of Appeals properly declined to do. (A18a)

To fabricate a semblance of credibility to this otherwise transparent failure of rationality, the petitioners weave an argument which incorporates references to (1) the legislative history of Section 3608 as though it were the standard for the application of Section 3607; (2) a nonexistent statutory conflict between Section 3607 and 3608; (3) the truism that the developer could have avoided the provisions of Section 3607 by merely not undertaking the conduct which rendered the statute applicable; as well as (4) the tautological argument, that if the statute permits the respondent to terminate these contracts, then the developer will not be able to enter into binding contracts of this kind. None of these artfully woven strands can withstand independent scrutiny.

First, the petitioners' presentation of the apparent fact that Congress enacted Section 3608 to provide retroactive relief from unconscionable leasing practices undertaken prior to 1975 in the

State of Florida is not relevant to the question of the applicability of Section 3607. If the sole purpose of the Condominium and Cooperative Abuse Relief Act of 1980 was to provide remedial relief from pre-1975 unconscionable Florida leases, then Congress would have merely enacted Section 3608. There would have been no reason for the passage of Section 3607 which concerns itself only with self dealing contracts executed after October 8, 1980 without regard to the economic fairness of said contracts. The petitioners' attempt to attribute, and thus superimpose, the legislative history of Section 3608 upon the provisions of Section 3607 is thus inexplicable.

Second, the petitioners unsuccessfully attempt to create a statutory conflict between Section 3607 and 3608. The petitioners' literary juxtaposition of Section 3607 and 3608, which the Court of Appeals merely described as "neighbors", does not reveal an inescapable statutory conflict because these two sections can never both be found to be applicable to the same transaction. Section 3607 applies only to agreements made after October 8, 1980 while Section 3608 applies only to agreements made prior to June 21, 1975. Section 3607 applies only when the contract is the result of self dealing, which is a matter of legal relationships, while Section 3608 applies only when the lease is unconscionable, which is a matter of economic fairness. Section 3607 affects only contracts which provide for the operation, maintenance or management of the respondent or its property while Section 3608 affects only leasehold interests wherein the cooperative corporation is the tenant and the developer is the landlord. Therefore, any reliance upon the naked phrases "lease" and "contract", as styled by the petitioners, is of no significance.

Third, the petitioners suggest that it is absurd if "a reservation by a developer of a leasehold estate for more than three years is subject to termination, but the reservation of a fee interest forever is not". (Petition, page 7) This assertion is not valid. Section 3607 authorizes the termination of certain contracts, and, therefore, a contract must exist for the statute to be applicable. Section 3607 requires the contract to provide for the operation, maintenance or management of the corporation or certain of its

property, and, therefore, property or property interests must be conveyed to the cooperative corporation in order for the requisite contract to be created. The phrase "reservation of a fee interest forever", however, is merely petitioners' way of expressing the fact that the developer did not convey property or property interests to the cooperative corporation. In such an event, the statute would not be applicable because no contract between the developer and the cooperative corporation would come into existence. Congress was concerned about the developer giving with one hand, by selling the entire building, and taking back with the other, by entry into self dealing contracts. If there is no giving, then there can be no taking. This is a logical, not an absurd result. The applicability of the statute is thus concededly dependent upon the conduct of the developer. The petitioners are therefore only articulating the truism that a developer can avoid the statute by not undertaking the conduct which renders the statute applicable.

Fourth, the petitioners complain that if, pursuant to Section 3607, self dealing leases are subject to subsequent termination, then the developer and the pre-conversion occupying tenants will be restricted in their ascribed negotiating opportunities. This suggestion ignores the plain language of Section 3607 which does not protect either the developer or the pre-conversion occupying tenants but protects the cooperative corporation from both of them. The statute effectively protects the cooperative corporation from the developer's temporary ability to undertake improper self dealing with regard to the property to be sold to the respondent, and, at the same time, protects the cooperative corporation from the intentional or unwitting desire of potential purchasing shareholders to artificially reduce the cost to themselves of the respondent's stock by "trading it off" against the value to the developer of such self dealing contracts. Thus, the practical effect of the decision of the Court of Appeals, although distasteful to the developer for obvious reasons, properly reflects the purpose and language of Secton 3607.

Thus, the essential predicates of the first Question Presented by the petitioners are absent.

III. The Court of Appeals Properly Applied The Statutory Definition Of "Special Developer Control" By Ignoring Petitioners' Argument Concerning An Unrelated State Statute.

The Court of Appeals properly applied the concept of "special developer control", which is expressly defined in 15 U.S.C. Section 3603(22) as follows:

> *"special developer control" means any right* arising under State law, cooperative or condominium instruments, the association's bylaws, charter or articles of association or incorporation, or power of attorney or similar agreement, *through which the developer may control or direct the unit owners' association or its executive board."* (Emphasis added)

The fact that the developer in this case controlled and directed the respondent's Board of Directors, as it created the domestic corporate entity, appointed and controlled the members of the Board of Directors and could substitute its judgment for respondent's decision-making process by means of its control of the Offering Plan, has been repeatedly conceded by the petitoners in the record below. (JA 564, 567; JA 96-99; A 23a) While this concession should be sufficient to preclude further discussion, and was so found by the Court of Appeals, the petitioners nonetheless still argue that "special developer control" is not what Section 3603(22) says it is.

The petitioners have misread 15 U.S.C. Section 3603(22) and submit their own definition of "special developer control" to be the power of the developer to unilaterally determine all of the terms of the entire conversion process. The petitioners confuse the developer's ability to legally compel the respondent to execute the subject contracts, which renders Section 3607 applicable, with the developer's ability to undertake the conversion sale of the building on economically suitable terms, which is the subject of state regulation.

In addition, petitioners have misread the New York State Martin Act (General Business Law, Section 352eeee *et seq.* (McKinney 1984) to require the developer to obtain an insider threshold subscription of fifteen percent. Under said New York State law, it is clear that a developer may obtain the requisite fifteen percent (15%) from the marketplace without the participation of any of the occupying tenants, or solely from the occupying tenants, or as a combination of the two.[3] The developer could have sought the fifteen percent (15%) subscription threshold from any potential purchaser, and, although the developer *chose* to negotiate with insider tenants, because it was more economically efficient to do so, the developer cannot claim it was statutorily ***required*** to undertake such negotiations with the occupying tenants. Only by misreading both of these statutes can the petitioners find the absence of special developer control.

Finally, the petitioners' attempt to invoke state preemption cannot provide proper grounds for granting this petition. Congress expressly stated in the Condominium and Cooperative Abuse Relief Act of 1980 that it does not seek to enter into the field of regulating the conversion process itself, but, leaves the

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[3] The petitioners acknowledged in the District Court that the Martin Act would permit the fifteen percent threshold to be obtained from existing tenants *or* from outside purchasers who agreed to occupy the apartment as their primary residence when it became vacant (JA 452) and the District Court similarly so found. (A 29a) On appeal, however, they submitted a misstatement of the Martin Act and the Court of Appeals, unfortunately, similarly so misstated the law, to require the fifteen percent threshold to be secured only from insider tenants. New York General Business Law, Section 352eeee, states in relevant part:

"1. As used in this section, the following words and terms shall have the following meanings:

(b) 'Non-eviction plan'. A plan which may not be declared effective until written purchase agreements have been executed and delivered for at least fifteen percent of all dwelling units in the building or group of buildings or development by bona fide tenants in occupancy *or bona fide purchasers who represent that they intend that they or one or more members of their immediate family intend to occupy the unit when it becomes vacant.*" (Emphasis added)

development of said regulation, such as the New York Martin Act, solely to the states.[4]

For these reasons, the record does not permit the formulation or the resolution of the second Question Presented by the petitioners.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 8, 1987

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[4]15 U.S.C. Section 3605:

> "It is the sense of the Congress that, when multifamily rental housing projects are converted to condominium or cooperative use, tenants in those projects are entitled to adequate notice of the pending conversion and to receive the first opportunity to purchase units in the converted projects and that State and local governments which have not already provided for such notice and opportunity for purchase should move toward that end. The Congress believes it is the responsibility of State and local governments to provide for such notice and opportunity to purchase in a prompt manner. The Congress has decided not to intervene and therefore leaves this responsibility to State and local governments to be carried out."